A new legal education for the new Argentine democracy

By:
Martin Bohmer
University of Buenos Aires Faculty of Law, Argentina

Every law school has an implicit or an explicit overall conception of legal education. This overall conception answers the questions: What to teach? How to teach it? Why to teach it that way? It is an overall conception because the three answers are linked to each other. The way law is conceived is connected to the way it must be taught (if law is, e.g., a group of authoritative texts, then the pedagogic tools to teach it should be aimed at making sure the students know those texts as accurately as possible) and both those issues are connected to the question about the ends of the law school: what kind of legal professionals it aspires to train (in the example maybe lawyers and judges deferent to legislated rules, able to make sense of the legal system and apply its mandates but unable or unwilling to take a critical stance towards it).

Every overall conception of law depends on a conception of political authority. This latter conception, be it an order and command kind or a more deliberative, conflict administration kind, is translated into a constitutional system of distribution of power. Te constitutional system could be organized around a conviction about the convenience of relying in a legislative, an executive or a constitutional supremacy and in any of these cases, the system of separation of powers will accommodate these different approaches to authority and to constitutional engineering.

Within each system, the role of the Judiciary will be different, and different will thus be the skills, aptitudes and attitudes required from both judges and lawyers. These professionals are not created in a vacuum; they are a key part of the institutional landscape of every political system and in its sense they have to be created as every other actor should be in order for the system to work. Finally then, legal education will follow promoting those elements required by the political system in order for legal professions to fulfill their role effectively.

Argentina created its political system in mid XIX century. Its conception of law and its correlative vision about the role of the judges affirmed, on the one hand, that legal systems can bring univocal solutions to every problem submitted to them (a conviction that is known with the name of “formalism”), given that the denial of the existence of legal loopholes and of contradictions between rules in regulatory systems is part of this ideology. On the other hand, formalism is the condition of possibility of upholding a deferential attitude towards positive law regardless of its content or its source of legitimacy (what Carlos Nino called “ideological positivism”).

Thus, in this new conception, judges received and accepted as obligatory the normative contents of whomever it was that wielded power, regardless if they did it through fraudulent elections, or elections in which a party that represented much of the population was proscribed, or directly through *coup d’etats*. This deference towards political actors was justified under the idea of the capacity of judges’ to be formalist and impartial. In fact, the conception of the task of the adjudicator consisted in conceiving them as neutral enforcers of the legislator’s will. In this sense, codification, and in particular the way in which the Civil Code was received by legal scholars and law schools, provided the tools to successfully carry out the formalist project and the separation between politics and law. But on these shores an

originally democratic idea was transformed into pantomime when judicial deference towards legislative supremacy was on the contrary due to whoever obtains power, however they did. Latin America's traditional distribution of power was always hyper presidential.

During its first forty years (between 1870 and 1910) the Code reigned on its own, and only in the beginning of the XX century needed the help of legal doctrine as supplementary authority. Even so, the books and treatises that explained our statutes were careful in presenting themselves as nothing more than the explanation of the solutions that the Code gave to new problems. Jurisprudence, in turn, was still understood as its neutral application. Thus, the formalist project kept disengaging law from politics, leaving public policy in the hands of whoever wielded power and the judiciary in charge of the solution of controversies in a case-by-case basis, without the restriction of s*tare decisis* and resting solely on the legal text.

On the flipside, judicial review (part of the American heritage of this mixed system) was a marginal activity and was reduced to exceptional circumstances. Accordingly, constitutional rights were divided between what legal doctrine deemed as "operative" (enforceable) and merely "programmatic" (rights that required legal regulations in order to be enforceable by the judiciary), a distinction that greatly reduced the powers of the judiciary to intervene in unconstitutional actions or omissions. The situation of the lack of enforceability of fundamental rights was even worse when the federal Supreme Court added the political question and the *de facto* doctrines making judicial deference towards *de facto* political powers explicit.

Thus it should be no surprise that legal education was reformed towards the end of the XIX century to perform the task in question: to teach formalism in a dogmatic, repetitive way.

But a few decades ago everything changed. When Argentine politics, traditionally free of rule of law strictures, lost all respect for the Constitution and its bill of rights and established a systematic policy of massive human rights violations, civil society, democratic politics and the Judiciary responded confronting our past putting human rights in the center of our conception of politics. The prosecution of the perpetrators, still in place, the participation in the global human rights legal community, the importance of litigation as a tool to defend rights and the new place of the judiciary are all part of the legacy of our democratic genesis.

Thus, the reconfiguration of law in Argentina produced a set of phenomena such as: the constitutionalization of law, i.e.: the assumption of the Judiciary of its role of enforcer of the Constitution and its active use of judicial review; the judicialization of politics and public policies, i.e.: the use of the judicial process by individuals and civil society organizations in order to advance their agendas; the multiplication of legal sources of authority, i.e.: not only the Codes are good law, but different pieces and levels of legislation, international treaties, international decisions, administrative regulations, etc.; and globalizations, i.e.: the possibility of expanding national public deliberation beyond national borders.

This reconfiguration of Argentine law calls for its articulation. We need an independent legal scholarship to make sense of the new conception, to distill it into doctrine and to find ways of identifying the skills, aptitudes and attitudes Argentine legal actors need to develop in order to make the system work and grow. This is the place and the challenge of Argentine legal education: to create the materials, the curricula and the pedagogy to train the lawyers and judges our new constitutional democracy badly needs.